

Initially, respondent argues the board does not have jurisdiction to review this matter pursuant to K.S.A. 44-534a and therefore the appeal should be dismissed. In the alternative, respondent argues the ALJ's Order should be affirmed.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over the issue in this appeal?

(2) If so, did the ALJ exceed his jurisdiction in naming Dr. Salone as claimant's authorized treating physician without directing respondent to provide a list of three physicians from which claimant can select one to direct her treatment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

An application for preliminary hearing was filed on June 30, 2010, which requested medical treatment, payment of medical bills and temporary total disability benefits if taken off work. As previously noted, the ALJ authorized Dr. Salone to perform an independent medical examination in his Order dated July 22, 2010. The ALJ further ordered the parties to prepare a joint letter to include a surveillance video.

An application for preliminary hearing was filed on October 19, 2010, and processed the same day. In the Notice of Intent, claimant requested an authorized physician to treat claimant as set out in Dr. Salone's letter dated August 17, 2010. Also temporary total disability compensation was requested if claimant was taken off work.

November 3, 2010, Tom E. Hammond filed a Notice of Withdrawal as attorney of record for the claimant. On November 10, 2010, Roger A. Riedmiller filed an entry of appearance on behalf of the claimant.

At the November 16, 2010 preliminary hearing, claimant's attorney, Roger Riedmiller, requested additional medical treatment through a change of physician. The IME by Dr. Salone was performed on August 17, 2010. Dr. Salone diagnosed claimant with a mild sprain of both the medial and lateral collateral ligaments of the left knee as well as left patellar bursitis with continued swelling. The doctor recommended a special therapy which uses a technique known to stimulate activity within tendons/ligaments to help strengthen those structures. This treatment would be performed on the medial and lateral collateral ligaments as well as the patella tendon. For the swelling around the left knee, Dr. Salone recommended electrical stimulation, interferential current machine used circumferentially around the left patella to decrease the swelling in that area and the medial left knee. The maximum physical therapy should be three times a week for four weeks.

Claimant testified that Dr. Salone was apathetic and disinterested and she requested that the ALJ order respondent to provide her with a list of three physicians from which she would select the authorized treating physician.

Respondent denied claimant needed additional medical treatment due to the video surveillance of claimant and the fact that Dr. Prohaska found claimant to be at maximum medical treatment. In the alternative, respondent argued Dr. Salone should be authorized to provide the limited therapy. After the preliminary hearing, the ALJ authorized Dr. Salone as claimant's treating physician in his Order dated November 16, 2010.

Claimant argues that the ALJ exceeded his jurisdiction by designating Dr. Salone to provide the treatment. Claimant argues that where there is a request for a change of treating physician the ALJ must order respondent to provide claimant with a list of three physicians.

Although claimant frames the issue as a request for a change of treating physician that is not the procedural posture of this case. As noted, claimant had been released from treatment, sought additional treatment and was examined by Dr. Salone, a court ordered independent medical examiner. Dr. Salone was not providing treatment and instead she was merely conducting an examination to determine if claimant needed additional treatment. Claimant could not be seeking a change of treating physician from Dr. Salone when that doctor had not provided any treatment. Moreover, before the ALJ is compelled to order respondent to provide the list of three physicians, there must be a finding that the services of the health care provider were not satisfactory.¹

This case was before the ALJ on a preliminary hearing application for medical treatment as suggested by the court ordered independent medical examiner. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) whether the injury arose out of and in the course of the employee's employment;
- (3) whether notice is given or claim timely made;
- (4) whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing

¹ See K.S.A. 44-510h(b)(1).

order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.²

Here, claimant alleges the ALJ exceeded his jurisdiction in designating Dr. Salone as her authorized treating physician. However, because no physician was currently authorized to provide treatment, claimant was not requesting a change of physician. Instead, claimant was requesting that the ALJ determine she needed ongoing treatment and to authorize a physician to provide that treatment. The Board has ruled in the past and continues to hold that this is not a jurisdictional issue subject to review on an appeal from a preliminary hearing order.³ Whether the ALJ must, in a given set of circumstances, authorize treatment from a list of three physicians designated by respondent is not a question which goes to the jurisdiction of the ALJ. At a preliminary hearing, an ALJ has the jurisdiction to decide questions concerning the furnishing of medical treatment.

While there is generally no jurisdiction to consider matters of medical treatment, whether an ALJ exceeds his or her jurisdiction is jurisdictional. After a thorough review of the file this Board Member finds nothing to suggest that the ALJ exceeded his jurisdiction in making his decision. ALJs must routinely determine the most appropriate method of treatment in order to satisfy the Act's goal of curing and relieving the effects of the injury.⁴ Determinations of whether claimant is at maximum medical improvement, whether claimant is in need of additional medical treatment, and selecting one treatment provider over another do not equate to decisions that exceed the ALJ's authority. Rather, as is contemplated under K.S.A. 44-534a, the ALJ determined issues regarding the furnishing of medical treatment.

In *Allen*⁵, the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

² See K.S.A. 2009 Supp. 44-551.

³ See *Hubbard v. Wesley Medical Center, LLC*, No. 1,040,850, 2008 WL 5122323 (Kan. WCAB Nov. 7, 2008); *Spears v. Penmac Personnel Services, Inc.*, No. 1,021,857, 2005 WL 2519628 (Kan. WCAB Sept. 30, 2005); *Briceno v. Wichita Inn West*, No. 211,226, 1997 WL 107613 (Kan. WCAB Feb. 27, 1997); *Graham v. Rubbermaid Specialty Products*, No. 219, 395, 1997 WL 377947 (Kan. WCAB June 10, 1997).

⁴ K.S.A. 2009 Supp. 44-510h(a).

⁵ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁶ Accordingly, claimant's appeal is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, it is the finding of this Board Member that claimant's appeal is dismissed and the Order of Administrative Law Judge John D. Clark dated November 16, 2010, remains in full force and effect.

IT IS SO ORDERED.

Dated this 28th day of January, 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

⁶ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁷ K.S.A. 44-534a.

⁸ K.S.A. 2009 Supp. 44-555c(k).